STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SAAD, WHITE, AND HOEKSTRA)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

JACK D. HILL, Deceased,
By EDWARD F. HILL,
Personal Representative,

Plaintiff-Appellee,

S.C. No: 119363

C.A. No: 221335

L.C. No: WCAC 98-000144

and
AUTOMOBILE CLUB OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

FAIRCLOTH MANUFACTURING COMPANY
and ACCIDENT FUND COMPANY,

Defendants-Appellants.
_____/

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DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

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ASSUMING A REMAND, SHOULD THE REMAND BE TO THE WORKER'S COMPENSATION APPELLATE COMMISSION NOT THE TRIAL MAGISTRATE?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellants' Appendix.)

Defendant-employer is a family operated business (27a). Plaintiff-employee[1] was a "friend" of the family; he worked as "a general shop laborer and truck driver. I guess that would be a good way to formulate it." (27a; 37a). Defendant-employer manufactures nuts, bolts, screws, and fasteners (27a). There was no finding that plaintiff drove the majority of his workday, nor any finding that the work-related driving covered long distances (11a; 27-38a).

The circumstances of plaintiff's injury were succinctly and accurately described by the Court of Appeals as follows:

> On January 25, 1991, Jack Hill's supervisor directed him to transport parts to a treatment facility located approximately two miles from defendant-employer's business location. Hill, an insulin-dependent diabetic, left the Faircloth plant alone, driving a company truck. Some distance beyond the exit Hill should have taken to reach the treatment facility, Hill collided with the back of a steel hauler truck. Witnesses reported to police that Hill looked as though he was convulsing from a seizure just before the accident. Hill stated that he remembered driving, but could not remember the collision. Hill sustained injuries in the accident that prevented him from performing his job at Faircloth.
>
> Prior to his death, Hill filed an application for workers' compensation benefits and Auto Club filed a petition seeking reimbursement of no-fault benefits paid to Hill after the accident. After Hill died, his petition was voluntarily withdrawn and Auto Club filed a new petition on July 7, 1992. Following trial, the magistrate denied benefits, specifically concluding that Hill's "employment with [Faircloth] did not cause, contribute to or aggravate his injuries at all" and, therefore, Hill "did not sustain a work-related personal injury as alleged in his petition for benefits."

[1] Plaintiff-employee passed away after he initiated this action from unrelated causes (19a). This action was continued by the Automobile Club of Michigan, the intervening plaintiff-appellee, to obtain reimbursement from defendants of no-fault benefits it had paid plaintiff with respect to the vehicular accident at issue here (10a). Defendants will refer to the deceased hereafter as "plaintiff."

> The WCAC affirmed, rejecting intervening plaintiff's argument that Hill's employment increased the risk of injury posed by his diabetic condition. The WCAC labeled this a "personal risk case" which requires a showing that Hill's work contributed to the injury in some manner beyond the common risks of daily life. The WCAC opined that "the mere act of driving, without proof of an increased risk beyond the normal risks of driving," cannot constitute an "increased risk" presented by employment. Because driving is an everyday activity, the WCAC reasoned, the magistrate properly found that plaintiff's injuries arose "exclusively on account of his personal, diabetic condition." (20a).

The Court of Appeals reversed the Commission's and Magistrate's denial of benefits. The Court found that plaintiff's injury "arose out of" his employment (*Id.*).[2]

Defendant applied and the Court granted defendants' application for leave to appeal (25a). In an order entered January 23, 2002, the Court added that the parties "are directed to include among the issues addressed, the question whether the Court of Appeals decision in this case is consistent with *Van Gorder v Packard Motorcar Co*, 195 Mich 588 (1917), and, if not, whether *Van Gorder* should be overruled." (*Id.*) The Court also ordered that the case be argued together with *Frazzini v Total Petroleum* (SC No. 119362).

This brief follows in support of defendants' position that the Court of Appeals has legally erred.

[2] The Court remanded, after making its "arising out of" ruling, for a determination of whether plaintiff's injury was also incurred "in the course of employment," an issue not resolved below due to the disposition of the case on the "arising out of" question. MCL 418.301(1). (24a).

ARGUMENT I

AN INJURY AT THE WORKPLACE THAT ARISES OUT OF A NON-WORK-RELATED DIABETIC SEIZURE IS NOT AN INJURY THAT "ARIS[ES] OUT OF EMPLOYMENT." ASSUMING *ARGUENDO* THAT THE EMPLOYER CAN BE HELD LIABLE FOR THE CONSEQUENCES FLOWING FROM THE SEIZURE HAVING OCCURRED DURING WORK HOURS, THE EMPLOYEE CAN ONLY RECOVER IF THE EMPLOYEE DEMONSTRATES HE WAS IN AN "UNUSUALLY DANGEROUS" EMPLOYMENT SITUATION AS CONTRASTED WITH A SITUATION POSING RISKS COMMON TO EVERYDAY LIFE.

The Court should reverse the Court of Appeals and reinstate the administrative orders of the Commission and Magistrate denying plaintiff benefits for failure to demonstrate an injury arising out of employment.

An injury must be one "arising out of and in the course of employment" to be compensable under the workers' compensation act.[3] This statutory formula states a two-pronged requirement as the word "and" in the formula indicates.[4] An injury resulting as a consequence of a non-work-related problem manifesting itself at the workplace is not an injury which "aris[es] out of" employment, although it is an injury that arises "in the course of" employment. The Court of Appeals in this case has, in effect, allowed for workers' compensation benefits where the employee meets only one-half of the coverage requirement. The Court of Appeals' ruling contravenes *Van Gorder v Packard Motorcar Co*, 195 Mich 588; 162 NW 107 (1917), a case directly on point. This Court should not overrule *Van Gorder*, but reaffirm it because it is true to

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[3] MCL 418.301(1).

[4] *Hopkins v Michigan Sugar Co*, 184 Mich 87, 90-91; 150 NW 325 (1916); *Pearce v Michigan Home & Training School*, 231 Mich 536, 537-538; 204 NW2d 699 (1925); see also, *Ward & Gow v Krinsky*, 259 US 503; 42 S Ct 529; 66 L Ed 1033 (1922).

the statute's text. Furthermore, even if there is an exception to *Van Gorder* that would allow compensation for additional injury at the workplace which flows from a non-work-related seizure, the Court of Appeals has erred nevertheless.[5] The correct inquiry under such exception is not whether the workplace increased in *any* manner the effects of the seizure. The correct inquiry is whether the workplace was "a place of extreme hazard," a place "'unusually dangerous'" as compared to the "common risks of everyday life."[6]

A. The Statute

> The only pertinent statute in this matter is the following:
>
> An employee, who receives a personal injury *arising out of and in the course of* employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act.

MCL 418.301(1)'s first sentence (emphasis added).

This provision states the essential coverage formula for workers' compensation. The formula "arising out of and in the course of" has remained unchanged since the inception of workers' compensation in Michigan in 1912. The original act said:

> If an employee who has not given notice of his election not to be subject to the provisions of this act,[7] as provided in part one, section eight, or who as given such notice and has waived the same as hereinbefore provided, receives a personal injury *arising out of and in the course of* his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting for such injuries such compensation shall be paid to his dependents as hereinafter defined. 1912 (1st Ex Sess) PA 10, part II, § 1 (emphasis added).

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[5] See *e.g.*, *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977).

[6] The former two quotations are from *Van Gorder*, *supra* at 592 and 597, respectively. The latter quotation is from the Commission's opinion in this case (15a); compare also, *Ledbetter*, *supra*.

[7] Originally, workers' compensation coverage was elective not mandatory. 1912 (1st Ex Sess) PA 10, part I § 4.

This coverage formula sets forth two requirements for an injury to be compensable, given the conjunction "and"[8] in the operative phrase. An injury must be one "arising out of . . . the employment." "[A]nd," the injury must be one "arising . . . in the course of employment."

B. The Court Has Recognized That The Statute Provides Two Requirements

The Court's earliest description of "arising out of and in the course of" employment recognized its dual requirements. *Hills v Blair*, 182 Mich 20, 25; 148 NW 243 (1914); compare also, *Ward & Gow v Krinsky*, 259 US 503; 42 S Ct 529; 66 L Ed 1033 (1922). In so doing, the Court drew upon English and Scottish law describing the phrase, as well as Massachusetts' law, all of which served as the basis for Michigan's workers' compensation statute. *Hills, supra* at 25. A good explanation of the two requirements is contained in *Hopkins v Michigan Sugar Co.*[9] The Court said:

> It is well settled that, to justify an award, the accident must have arisen 'out of' as well as 'in the course of' the employment, and the two are separate questions to be determined by different tests, for cases often arise where both requirements are not satisfied. An employee may suffer an accident while engaged at his work or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore, cannot be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow. 1 Bradbury on Workmen's Compensation, p. 398. 'Out of' points to the cause or source of the accident, while 'in the course of' relates to time, place, and circumstances. *Fitzgerald v Clark & Son*, 2 K.B. (1908) p. 796.

Similarly, the Court said in *Pearce v Michigan Home & Training School*, 231 Mich 536, 537-538; 204 NW 699 (1925), quoting a Massachusetts case:

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[8] **"and"**: . . . 1. **then**: used to link two verbs or statements about events to indicate that the second follows the first. *Just add water and stir. Encarta World English Dictionary* (2001).

[9] 184 Mich 87, 90-91; 150 NW 325 (1916).

> It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment . . . it must appear to have its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Therefore, "*arising out of . . . employment*" pertains to causal connection and risk of employment. "Arising . . . in the course of employment" pertains to the time and place of employment.

The Court of Appeals in this case recognized that the coverage formula consists of two inquiries not one (21a-22a). The Court also recognized that different analytical inquiries pertain to each (*e.g.*, 24a n 6). This Court should take the opportunity here to agree and reiterate that the statute's word "and" means there are two requirements in the basic coverage formula not one. The last time the Court visited this area, although not specifically blending the two separate inquiries, the Court questioned whether under recent practice the phrase contemplates one or two requirements.[10] The Court's remark was prompted by that decisional law which tended to blend or alter the two requirements.[11] The Court should explicitly reject blending or alteration of the bifurcated statutory test. The statute's two requirements - never changed by the Legislature and never explicitly abandoned by the Court - require an inquiry into whether the injury arises out of

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[10] *Simkins v General Motors Corp (After Remand)*, 453 Mich 703, 712-713 n 14; 556 NW2d 839 (1996).

[11] *Simkins*' note that the bifurcated distinction has not been used in Michigan is clearly contrary to the Michigan law already discussed and to be discussed. *Id.*

and in the course of employment. Abandonment of such bifurcated analysis has led to controversy, unpredictability, and *ad hoc* decision making in the past.[12]

C. *Van Gorder* Is On Point And Controls Resolution Of This Case

The Court recognized these dual requirements in resolving *Van Gorder*, *supra*. Defendants submit *Van Gorder* controls resolution of this case.

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[12] One of many examples is *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191; 289 NW2d 631 (1980). There, Justice Ryan authored the lead rehearing opinion and said:

> Our brothers, writing for reversal of the Workers' Compensation Appeal Board decision and reaffirmance of *McClure I*, would add this case to a line of recent decisions in which this Court has expanded and broadened the sweep of workers' compensation coverage by judicial decision.[4]
>
> To follow that course here would see this Court effect more worker compensation law "reform" of its own, unchecked by burdensome legislative committee hearings, union and management testimonial expertise, cost analyses, consideration of the effect upon related social legislation and the risk of rejection following bicameral debate or of executive veto.
>
> We decline to continue the ongoing dilution of the legislative requirement that, as a condition of compensability, an employee's injury must be suffered "out of and in the course of his employment" by first equating "circumstance of employment" with "out of and in the course of employment", and finally substituting the newly created judicial standard for the longstanding legislative norm. We cannot agree with our colleagues that:
>
> > The significant inquiry in the instant cases is not whether the employees were injured while carrying out duties absolutely required by their employment contracts, but whether the injuries occurred as a circumstance of the employment relationship.
> >
> > We are of the view, of course, that neither of the stated alternatives is the "significant inquiry"; that the significant inquiry is whether the injuries arose "out of and in the course of his employment".
> >
> > By this case, the Court is asked to extend the scope of workers' compensation coverage in three inter-related ways:
> >
> > 1. To that *time segment* of the workers' day historically and intentionally allocated to the employee for an interruption of and withdrawal from the service of the employer, traditionally understood to be mealtime,
> >
> > 2. To *any activity* whether performed "out of and in the course of his employment", or not, in which the employee may be engaged during that period, and,
> >
> > 3. To *any place* in which the employee may be during that period. . .
> >
> > It may indeed have been a "circumstance" of Mr. McClure's employment that he was in the middle of Fort Street, and of Ms. Krolczyk's that she was driving a car a half-mile away from work during the lunch period, but the Legislature has not seen fit to provide compensation for injuries suffered by workers during off-premises lunch-hour activity of a purely personal character. Perhaps it ought to have done so long ago – but it has not, and we are not constitutionally free to do so in its place. Like it or not, the test for entitlement to compensation benefits remains "out of and in the course of" employment.

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[4] [Defendants omit here the Court's lengthy catalogue of cases illustrating the expansion of coverage via judicial decision.]

McClure, supra, pp 203-207 (emphasis in original)(opinion of RYAN, J.). See also, Chief Justice T.E. Brennan's dissent in *Whetro v Awkerman*, 383 Mich 235, 249; 174 NW2d 783 (1970). ["The function of the workmen's compensation act is to place the financial burden of industrial injuries upon the industries themselves, and spread that cost ultimately among the consumers . . .. The terms 'arising out of' and 'in the course of' are not redundant. They mean two different things."]; and, Judge Mackenzie's dissent in *Smith v Greenville Products Co*, 185 Mich App 512, 518; 462 NW2d 789 (1990).

The facts of *Van Gorder* were that the employee was standing on a scaffold at work approximately six feet from the ground when he was overtaken by a non-work-related epileptic fit. As a result of the seizure, he fell from the scaffold, fractured of his skull, and died. There was "no question but that decedent received his injury in the course of the employment."[13] The issue was: "Did the injury arise out of the employment?"[14] Reviewing prior case law, including the English statute upon which "arising out of and in the course of employment" derived, the Court recognized that Mr. Van Gorder's injury must satisfy "both" statutory requirements.[15]

Applying the "arising out of" requirement, the Court first noted that the origin of plaintiff's injury had nothing to do with the workplace:

> We therefore have before us the case of a servant whose fall was brought about by no strain, excitement, or overexertion in the performance of his service, no overheated or unhealthy condition of place of employment bringing on a temporary faintness, no misstep due to contributory negligence, no unsafe place in which to work, no negligence of a fellow servant, but a fall due to an epileptic fit and a resultant fracture of the skull, producing death.[16]

Similarly in the instant case there was no finding - indeed, no contention - that plaintiff's diabetic seizure was brought on in any manner by the workplace or by work activity (12a).

The *Van Gorder* Court denied benefits because the fracture due to the fall following the epileptic fit was not a fracture that arose out of employment. In reasoning directly applicable here, the Court held:

> The fall was caused and caused only by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that had he fallen in an epileptic fit while standing on the floor and received the injury he did that the

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[13] *Van Gorder*, *supra* at 591.
[14] *Id.*
[15] *Id.* at 593, 594, 598.
[16] *Id.* at 590-591.

> injury arose out of the employment, and that defendant was liable. *Collins v Gas Co*, 171 App. Div. 381 (156 N.Y. Supp. 957). The height from which he fell here only a short distance, could not change the liability for the injury. The most that can be said is that the height from which deceased fell may have aggravated the extent of the injury. A person falling a greater distance may be more seriously injured than one falling a lesser distance; *but it does not change the question of responsibility, of liability.* The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall. When the deceased was seized with the epileptic fit he would have fallen no matter where he was, and the employer cannot be held responsible because that unfortunate seizure occurred when the workman was on a scaffold, a few feet from the floor.[17] (Emphasis added).

Similarly here, plaintiff's vehicle collision was caused by the diabetic seizure (12a). The seizure, like Mr. Van Gorder's fit, "was the direct and only cause of his injury."[18] The fact that plaintiff's collision, like Mr. Van Gorder's fall, "may have aggravated the extent of the injury" is not determinative and "does not change the question of responsibility, of liability." *Id.* When plaintiff was seized by his diabetic problem, as when Mr. Van Gorder was seized with his fit, plaintiff would have fallen (if standing) or crashed (if driving) "no matter where he was." *Id.* The mere fact that plaintiff was driving, like the mere fact that Mr. Van Gorder was "on a scaffold," did not change the result because "the employer cannot be held responsible because the unfortunate seizure occurred" while engaged in workplace activities. *Id.*

Van Gorder correctly understood the dual requirements of arising out of and in the course of employment and correctly applied them. The mere fact that a non-work-related problem manifests itself between 9:00 a.m. - 5:00 p.m. (work hours), rather than after work hours, does not make the employer responsible for the consequences of the problem. Nor is the result different simply because the employee was (expectedly) engaged in work activity when the non-work-related problem struck. Put differently, the fact that the injury occurred "in the

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[17] *Id.* at 597-598.

course of employment," but does not change the fact that it did not "arise out of" the employment. The injury arose, *i.e.*, "start[ed] into action," as a result of the seizure.[19] The injury "originate[d] from"[20] plaintiff's seizure. The injury "happen[ed] . . . as a result of" that.[21]

D. *Van Gorder* Should Not Be Overruled

The operative statutory words at the time of *Van Gorder* remain the same today. Therefore, the result should be the same today. The Court has never overruled *Van Gorder*. Subsequent cases citing *Van Gorder* only underscore its applicability here.

In *Wilson v Phoenix Furniture Co*,[22] the employee received benefits because, unlike *Van Gorder*, the fall at work "was caused by tripping on a nail protruding from the floor," as opposed to a non-work-related problem.[23] The case was therefore unlike *Van Gorder* or this case. In *Williams v Missouri Bridge & Iron Co*,[24] the employee fell and died as a result faulty air pressure within a caisson (an enclosed work locker). The Court distinguished *Van Gorder* in a most direct manner as follows:

> Herein lies the distinction between this and the Van Gorder Case. In that case epilepsy caused the fall. In the present case caisson disease caused it. The epilepsy had no causal connection with the employment. The caisson disease was directly due to it. It, therefore, arose out of employment.[25]

Here, plaintiff's seizure caused the consequent collision, like *Van Gorder* and unlike *Williams*.

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[18] *Van Gorder* at 597-598.
[19] A definition of "arise" in *The New Webster Encyclopedic Dictionary of the English Language* (1971).
[20] *Webster's New Collegiate Dictionary* (1980)'s definition of "arise."
[21] *Encarta World English Dictionary* (2001)'s definition of "arise".
[22] 201 Mich 531; 167 NW 839 (1918).
[23] *Id.* at 534.
[24] 212 Mich 150; 180 NW 357 (1920).
[25] *Id.* at 153.

Equally important as the fact that this Court has never overruled *Van Gorder* is the fact that neither has the Legislature. Despite amending the workers' compensation statute countless times, the Legislature has never disapproved *Van Gorder*'s application of the arising out of requirement in cases where the employee suffers a seizure at the workplace and consequent injuries.

The Court has recognized that such *stare decisis* and legislative acquiescence require observance of longstanding precedent. In *Boyd v W.G. Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), a workers' compensation case, the Court said:

> This Court has stated that the doctrine of stare decisis applies with full force to decisions construing statutes or ordinances, especially where the Legislature acquiesces in the Court's construction through the continued use of or failure to change the language of a construed statute. [Citations omitted]. In *Dean v Chrysler Corp*, 434 Mich 655, 664; 455 NW2d 699 (1990), we stated:
>
> > When, over a period of many years, the Legislature has acquiesced in this Court's construction of a statute, the judicial power to change that interpretation ought to be exercised with great restraint. On more than one occasion our Court has quoted with approval the statement that stare decisis is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature. [Citations omitted].
>
> We further noted that the principles of stare decisis are particularly applicable when the Legislature has reenacted the statutory language without change. *Id.* at 665. The Legislature has revised the WDCA several times but has yet to take any action that would indicate its disapproval of the *Roberts* interpretation of § 845. Because of its failure to amend § 845, the Legislature has accepted the interpretation of that section given by this Court in *Roberts* as an important part of the entire workers' compensation scheme.

> Thus, we believe that this Court should not disturb the *Roberts* interpretation.[26]

Van Gorder is older than *Roberts*. The workers' compensation statute has been amended more times by the Legislature from the time of *Van Gorder* to the present than in the time span described in the above quotation. The Court should not overrule *Van Gorder*. If *Van Gorder* had done violence to the statute's text, that might be different.[27] *Van Gorder* was true to the text.

E. Is The Court of Appeals' Decision Here Inconsistent With *Van Gorder*?

The Court has asked in its order granting leave whether the Court of Appeals' decision is consistent with *Van Gorder*. It is not consistent with *Van Gorder*. For the reasons described above and given the above holding of *Van Gorder*, *Van Gorder* dictates the result contrary to that reached by the Court of Appeals here.[28]

F. Is There An Exception To *Van Gorder*?

The Court of Appeals' analysis centered on *Ledbetter*, *supra*, and the analysis of the Worker's Compensation Appellate Commission in this case. *Ledbetter* and the instant Commission decision, while not in strict compliance with *Van Gorder*, can be reconciled with *Van Gorder* insofar as they might be viewed as developing an exception alluded to *Van Gorder*.

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[26] *Boyd*, *supra* at 525-526.

[27] *E.g.*, *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000).

[28] The Court might note that *Van Gorder* does not offend that axiom in workers' compensation that says the employer takes employees as it finds them, *e.g.*, with their pre-existing frailties and predispositions to injury. *Gardner v Van Buren Public Schools*, 445 Mich 23, 48; 517 NW2d 1 (1994). *Van Gorder* does not offend this axiom because the axiom is designed to hold employers liable for aggravation of the employee's pre-existing condition. Thus, an employee with a pre-existing condition is entitled to benefits if work aggravates that pre-existing condition. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 368; 329 NW2d 713 (1982); *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 250; 262 NW2d 629 (1978); *Deziel v Difco Laboratories*, 394 Mich 466, 475-476; 232 NW2d 146 (1975).

Here, plaintiff seeks no benefits for work aggravation of his pre-existing diabetic problem. There is, therefore, no offense to the axiom. It has never been the law that mere manifestation of a non-work-related problem at the workplace equates with a compensable condition. *Miklik*, *supra* at 370; *Kostamo* v *Marquette Iron Mining Co*, 405 Mich 105, 116-117; 274 NW2d 411 (1979); *Marman v Detroit Edison*, 268 Mich 166; 255 NW 750 (1934); *Castillo v General Motors*, 105 Mich App 776, 779-782 (1981).

But, the problem here is that the Court of Appeals did not follow *Ledbetter*'s and the Commission's exception to *Van Gorder* and, instead, misapplied the exception analysis.

Specifically, *Van Gorder* intimates that an exception might exist in exceptional circumstance where the employee is laboring "in a place of extreme hazard," "where the place of labor is 'unusually dangerous.'" *Van Gorder*, *supra* at 592, 597, respectively.

Van Gorder said in this regard:

> The English statute contains the same provision as does ours, and we are unable to distinguish this case in principle from the instant case or the two later English cases to which we shall refer, with the one exception which we do *not* regard as controlling, but which might have been so regarded by the English court, as we shall presently see, and that is the fact that the workman in the *Wicks Case* was in a place of extreme hazard ...."[29] (Emphasis added).
>
> * * *
>
> The Lord President takes occasion to refer to the *Wicks Case* as belonging to that class of cases where the place of labor is "unusually dangerous."[30]

In *Wicks*, the employee was employed in unloading coal from a ship and was obliged to "stand upon a stage, which was made so that he could look down the hold" of the ship.[31] The job thus required "'necessary proximity to the precipice.'"[32]

Laying aside that *Van Gorder* said it did *not* regard this "one exception ... as controlling" in Michigan,[33] *Ledbetter* and the Commission's analysis could be considered a development of *Van Gorder*'s allusion to an exception.

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[29] *Van Gorder*, *supra* at 592.
[30] *Id.* at 597.
[31] *Id.* at 592.
[32] *Id.*
[33] *Id.* at 592.

In *Ledbetter*, the employee was stricken with an idiopathic fall while at the workplace. "An idiopathic fall is one resulting from some disease or infirmity that is strictly personal to the employee and unrelated to his employment." (19a, quoting *Ledbetter* at 333). Mr. Ledbetter fell as a result of his infirmity onto a concrete floor at work. That fall fractured Mr. Ledbetter's skull and proved fatal. The question posed was: did the fact that Mr. Ledbetter fell onto a concrete floor at the workplace, as opposed to a less dangerous floor elsewhere, suffice to render his skull fracture one "arising out of . . . employment?" Stated otherwise, did the workplace so increase the risk of injury from what might have resulted elsewhere that the injury can be considered related to an employment risk?

Ledbetter answered the question in the negative. The workplace had not sufficiently increased the risk of injury from what it might have been elsewhere. At least, plaintiff had not so proved to the satisfaction of the factfinders. *Ledbetter*, and cases which have followed it,[34] recognize that it is not enough that the workplace added something to the ultimate injuries. Adding something or *any*thing is not the meaning of "increased risk." "Increased risk" means a "'substantial employment contribution.'" *Ledbetter* at 336, quoting Larson. Absent that, the resultant injuries remain "predominantly" personal and noncompensable. *Ledbetter* at 336. Benefits were thus denied in *Ledbetter* because:

> It cannot be said *with certainty* that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious. *Ledbetter* at 337 (emphasis added).

The Worker's Compensation Appellate Commission in the instant case followed this analysis. The Commission said in pertinent part:

> We agree that the mere act of driving, without proof of an increased risk beyond the normal risks of driving, is insufficient to meet the *Ledbetter* test.

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[34] *E.g., McClain v Chrysler Corp/Gapinski v Mayfair Plastics Co,* 138 Mich App 723; 360 NW2d 284 (1984).

> In order for an injury to be compensable, the risk posed by the employment situation must go beyond the common risks of everyday life. This was recognized in *Ledbetter* where the Court, upholding the denial of benefits, noted that "it cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious." It likewise cannot be said in this case. Driving, whether for personal purposes or to go to or from work, is at the heart of everyday life. It is something most people do every day. Plaintiff presented no proof indicating that Mr. Hill's driving on the date of the accident contained any greater or unusual risk than normal, everyday driving.[5] Under these circumstances, the magistrate could reasonably conclude that Mr. Hill's injuries arose exclusively on account of his personal, diabetic condition, and not as in any way a consequence of his employment.
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> [5] We are not saying that this plaintiff (or others in similar situations) could not have presented proofs showing an increased risk while driving as part of his or her duties. We are only stating that the mere act of stepping into a motor vehicle is not, as a matter of law, sufficient to make any subsequent injury work-related. We emphasize that in the case at bar, the magistrate found a pure personal risk situation, without a contribution by employment. Plaintiff does not challenge the categorization of this case as a personal risk situation. (Commission's opinion, p 3).[35]

The Commission's inquiry is the correct inquiry, if there should be any exception at all to *Van Gorder*. One cannot determine if work has "increased" the risk unless one measures work-risk against some base. The base is common everyday risks. Put differently, the correct determination of "increased risk" can only be made by determining whether there is an "increase" as compared to something else. That "something else" is everyday activities, as the Commission says. This exception is - at most - what *Van Gorder* alluded to, but also recall *Van Gorder* rejected the exception. *Van Gorder* at 592.

[35] Thus, a postal worker driving a mail truck during a snow emergency when virtually no one else would be on the road may fit the exception. The postal driver's "place of labor is 'unusually dangerous'" under such circumstances. *Van Gorder* at 597. He or she is "in a place of extreme hazard." *Id.* at 592. Contrasted with the common risk of everyday driving, the postal worker's risk is such that it might be said "with certainty" that work made a "substantial employment contribution" to the resultant accident. *Ledbetter*, at 337, 336, respectively.

In a non-driving scenario, consider a window washer on a high-rise office building. A seizure and fall from a scaffold 50 stories high is a fall from a "place of labor [that] is 'unusually dangerous.'" *Van Gorder* at 597. It is a fall from a "place of extreme hazard." *Id.* at 592. It may be said "with certainty" that work made a "*substantial* employment contribution" to the consequent injuries. *Ledbetter*, *supra* at 337, 336, respectively (emphasis added).

G. Assuming Such Exception To Noncompensability Can Be Derived From *Van Gorder*, The Court Of Appeals Misapplied The Exception.

Having a diabetic seizure while driving at work increases the risk of injury as compared to having a diabetic seizure while sitting on a sofa at home. This truism, standing alone, would satisfy the Court of Appeals that work activity "constitute[d] an increased risk" such that plaintiff's motor vehicle collision injury "arose out of" the employment (20a). Yet, if the exception developed by *Ledbetter* and the Commission to (or from) *Van Gorder* is valid, the test is not: did the work activity increase in *any* manner the consequent injuries? The test is: did the work activity increase the risk of injury when compared to risks away from the workplace? Only if the answer to the latter question is "yes" could one say with comfort that compensability may be allowed because "the place of labor is 'unusually dangerous'" and "a place of extreme hazard."[36]

This Court can see that the Court of Appeals *sub silentio* holds defendants liable by comparing plaintiff's work activities with the most risk-free behavior in which plaintiff might engage away from the workplace (*e.g.*, sitting on a sofa rather than driving). By contrast, the Commission - relying upon *Ledbetter* - had delved further than the Court of Appeals into this technical area. It recognized the decisionmaker must ask whether the risk of injury is decidedly greater than what the employee might encounter outside of work so that, per *Ledbetter*, it can "be said *with certainty* that had the fall occurred at a different location, away from the employer's premises the injuries would have been less serious." *Ledbetter* at 337 (emphasis added).

Rather than following this type of inquiry, the Court of Appeals said:

> We hold that, if the car accidents occurred in the course of their employment, even if caused by an idiopathic condition, employment-related driving constitutes an increased risk which aggravated the employees' injuries. Accordingly, injuries

[36] *Van Gorder* at 597, 592, respectively.

> attributable to the collisions "arose out of" their employment, entitling the employees to workers' compensation benefits. (20a).
>
> * * *
>
> Nonetheless, we hold that if Hill and Frazzini drove the vehicles for job-related purposes and if having a diabetic seizure while driving aggravated or otherwise increased plaintiff's injuries, then those aggravated injuries directly caused by driving the vehicles are compensable under the Worker's Disability Compensation Act, MCL 418.301(1); MSA [1]7.237(301)(1). (23a-24a, bracketed correction is defendants).

If this were the law, then the employees in *Van Gorder* and *Ledbetter* would have recovered. The fall from a scaffold in *Van Gorder* and the fall onto a concrete floor in *Ledbetter* "otherwise increased plaintiff's injuries." *Id.* The test for the exception is not whether work added something to the gravity of the injuries. The test is whether work "increased" the risk of the resultant injury as compared to the risk of such a result in nonoccupational life. The correct test is a comparative one, not an "any increase" test.

The Court of Appeals therefore misapprehended the inquiry, assuming *arguendo* an exception to *Van Gorder*. Plaintiff was driving two miles to deliver material; there was no contention, no showing, and no finding that anything but normal driving conditions existed (11a; 14a).

H. Still Assuming The Exception, The Determination Of Whether The Workplace Activity Was "'Unusually Dangerous'" And "A Place of Extreme Hazard," Is A Factual Question. That Factual Question Was Resolved Against Plaintiff.

Professor Larson says: "If it is agreed, as the majority of courts agree, that the employment must contribute something . . ., there remains the *fact* question of how great the added hazard must be." 1 Larson, *Workers' Compensation Law*, § 9.01[4][d], pp 9-11, 9-12, emphasis added.

"How great [must] the added hazard be?" The added hazard must be greater than what a person stricken by a diabetic seizure might encounter away from the workplace. *Ledbetter*; compare also *Van Gorder*. Away from the workplace, a person stricken with the seizure may be driving because that is an everyday activity, as the Commission says. Once the question is correctly phrased and analyzed, it becomes a question of fact and leaves scope for some difference of judgment, as Larson also recognizes. Compare, 1 Larson, *supra* at pp 9-12, 9-13.

Here, the fact question was resolved against plaintiff. The Commission is the "ultimate factfinder" in workers' compensation. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702 n 5; 614 NW2d 607 (2000). The Commission found as fact, and the trial Magistrate likewise implied, that the "added hazard" of plaintiff's activity at the time of the seizure was not "great." Larson, *supra*. The Commission effectively found, to use the words of *Van Gorder*, that plaintiff was in no "place of *extreme* hazard," no "place of labor [that] is '*unusually* dangerous.'" *Van Gorder* at 592, 592 (bracketed word and emphasis added). Or, to use the words of *Ledbetter*, it cannot be said "with certainty" that if the seizure happened away from the workplace the injury would have been less serious. *Ledbetter* at 337. The injury thus remained "predominantly personal." *Id.* at 336.

The Court should respect this fact finding. *Mudel*. "[E]xtraordinary deference [is to be] accorded the WCAC in this highly technical area of the law." *Mudel, supra* at 695. And, "where the WCAC and the magistrate agree on the facts and legal conclusions in a particular workers' compensation case, the courts will rarely disturb the result." *Mudel, supra* at 695.

The Court of Appeals did not ask itself "how great the added hazard must be?" It only asked whether work added some hazard. Unless an employee was reclining at work as a

mattress tester when stricken with a seizure, work would add something to the injury. Unless the employee stricken with an idiopathic fall collapses onto a bed of feathers at work, work will add something. The question is not whether work added something, but whether work increased the gravity of the injury *as compared to* what the employee might have encountered in everyday life.

The Court of Appeals said that, per Larson, other sister states award benefits for vehicular collisions resulting from seizures (22a).[37] Whatever may be the rule in other states, this Court's response to the Court of Appeals' reasoning should be: the Legislature has never seen fit to disapprove *Van Gorder* in 86 years. Compare *Boyd, supra* and *Dean v Chrysler Corp, 434 Mich 655, 664; 455 NW2d 699 (1990).* This is so despite the Legislature's readiness and willingness to amend the workers' compensation statute many times to create special "arising out of and in the course of employment" rules usually in response to case law. There are, for example, such special rules for mental disabilities;[38] conditions of the aging process, including but not limited to heart and cardiovascular conditions;[39] injuries incurred in the pursuit of activities that have a social or recreational aspect;[40] and occupational diseases combining with other diseases or conditions.[41]

In this "highly technical area" both the Commission and Magistrate had it right and the Court of Appeals erred by misunderstanding how to measure "increased risk."

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[37] The general question is less well settled than implied. Witness the deep 5-4 split in the recent: *Flanner v Tulsa Public Schools*, ____ Ok ____; ____ P3d ____ (2002)(rel'd February 12, 2002)(Westlaw 226738).

[38] MCL 418.301(2), a reaction to *Deziel v Difco Laboratories (After Remand)*, 403 Mich 1; 268 NW2d 1 (1978). See *Hurd v Ford Motor Co*, 423 Mich 531, 534; 377 NW2d 300 (1985).

[39] MCL 418.301(2), a reaction to such cases as *Zaremba v Chrysler Corp*, 377 Mich 226; 139 NW2d 745 (1966) and *Kostamo, supra.*

[40] MCL 418.301(3), a reaction primarily to the sensational case: *Signorelli v GKN Automotive Components Inc* decided by the Administrative Law Judge December 23, 1980 and later reversed at 1985 WCABO 252 (Appeal Board Op #41). The Legislature also refined § 301(3)'s exclusion from what it had originally crafted. *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 93-94; 614 NW2d 862 (2000).

[41] Originally 1937 PA 61, now MCL 418.431. See *Mercante v Michigan Steel Casing Co*, 320 Mich 542; 31 NW2d 712 (1948) and *Felcoskie v Lakey Foundry Corp*, 382 Mich 438; 170 NW2d 129 (1969) for a general history of compensation involving occupational diseases.

ARGUMENT II

ASSUMING A REMAND, THE REMAND SHOULD BE TO THE WORKER'S COMPENSATION APPELLATE COMMISSION NOT THE TRIAL MAGISTRATE.

Should the Court disagree with the preceding argument, the Court should recognize that the Court of Appeals also erred by remanding this case on the "in the course of employment" issue to the trial Magistrate, rather than the Worker's Compensation Appellate Commission. Per *Mudel, supra* at 617, remands from the Courts go to the Commission not the Magistrates. If upon remand the Commission finds the record incomplete, then it is within the Commission's statutory discretion to remand to the Magistrate for a more complete record. MCL 418.861a(12).

RELIEF

WHEREFORE, defendants-appellants, Faircloth Manufacturing Company and Accident Fund Company, respectfully request that the Supreme Court reverse the decision of the Court of Appeals and reinstate the order of the Worker's Compensation Appellate Commission. Alternatively, the Court should remand to the Commission.

Respectfully submitted,

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BY: _____

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Dated: March 19, 2002